WISCONSIN SUPREME COURT CALENDAR
AND CASE SYNOPSES
SEPTEMBER, 2011

The cases listed below will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol.

This calendar includes cases that originated in the following counties:

Fond du Lac
Kenosha
Milwaukee
Oconto
Rock
Sheyboygan
Washington
Winnebago

TUESDAY, SEPTEMBER 6, 2011

9:45 a.m.	09AP1643-CR	-	State v. William Dinkins, Sr.
10:45 a.m.	08AP2759-CR	-	State v. Daniel H. Hanson
1:30 p.m.	10AP1937-OA	-	Wisconsin Prosperity Network, et al. v. Gordon Myse, et al.

WEDNESDAY, SEPTEMBER 7, 2011

9:45 a.m.	10AP445-CR	-	State v. Sharon A. Sellhausen
10:45 a.m.	10AP772-CR	-	State v. Carl L. Dowdy
1:30 p.m.	09AP608	-	John Adams v. State of Wisconsin

WEDNESDAY, SEPTEMBER 14, 2011

9:45 a.m.	09AP2176	-	Dawn L. Maxwell v. Hartford Union High School District
10:45 a.m.	09AP2907-CR	-	State v. Joseph J. Spaeth
1:30 p.m.	09AP2422-CR	-	State v. David W. Domke

FRIDAY, SEPTEMBER 16, 2011

9:45 a.m.	08AP1830	-	MBS-Certified Public Accountants, LLC v. Wisconsin Bell Inc.
	08AP1972	-	Thomas W. Jandre v. Physicians Ins. Co. of Wisconsin
01:30 p.m.	09AP1557	-	260 North 12th Street, LLC v. State of Wisconsin Department of Transportation

The Supreme Court calendar may change between the time you receive this synopsis and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. That office will also have the names of the attorneys who will be arguing the cases.

Radio and TV, and print media wanting to take photographs, must make media requests 72 hours in advance by calling Supreme Court Media Coordinator Rick Blum at 608-271-4321. Summaries provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
TUESDAY, SEPTEMBER 6, 2011
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a Dodge County Circuit Court decision, Judge Andrew P. Bissonette, presiding.

2009AP1643-CR State v. William Dinkins, Sr.

This case examines if a convicted sex offender is exempt from complying with the address reporting requirement of Wisconsin's sex offender registration law on grounds that the sex offender claims to be homeless.

Some background: William Dinkins Sr. was convicted in 1999 of first-degree sexual assault of a child and was sentenced to 10 years in prison. The offense required him to register as a sex offender upon his release from prison and to provide required information for the sex offender registry, including the address at which he would be residing no later than 10 days before being released from prison.

The circuit court later found that the defendant had tried to comply with the reporting requirement but had been unable to find housing for himself on his release from prison.

On July 17, 2008, three days before his scheduled release date, a complaint was filed charging the defendant with failing to provide required information to the sex offender registry 10 days prior to his release. The following day the defendant was transferred from Oshkosh Correctional Institution to the Dodge County Jail, where he remained during the trial court proceedings. The defendant filed three motions to dismiss, all of which were denied. Following a bench trial, the defendant was found guilty of the charged offense. Sentence was withheld, and the defendant was placed on probation for 30 months on condition that he serve 90 days in jail.

Dinkins filed a motion for post-conviction relief, arguing that the offense of failing to report information to the sex offender registry requires proof that the defendant had actual knowledge of the information he was required to provide. The defendant argued he lacked such knowledge because he did not know where he would be living upon release from prison. He also argued that failure to construe § 301.45(2)(a) to require proof of knowledge of the required information would violate his right to substantive due process and render the statute impermissibly vague. The circuit court denied the motion. The defendant appealed, and the Court of Appeals reversed.

The Court of Appeals concluded that the plain language of §§ 301.45(2)(a)5. and (e)4. does not permit prosecution of a soon-to-be-released prisoner for failing to fulfill the address reporting requirement when the prisoner does not have an address at which he can reasonably predict he will be able to reside after his release from prison.

The Court of Appeals noted that it lacks the authority to improve on the statutory scheme, and it said if there is a remedy for the problem, that remedy must come from the legislature. The state says whether a convicted sex offender who claims to be homeless must comply with the address reporting requirement goes to the heart of the legislative intent, which is to facilitate the monitoring of sex offenders by law enforcement and protect the public from future sex offenses.

WISCONSIN SUPREME COURT
TUESDAY, SEPTEMBER 6, 2011
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a Kenosha County Circuit Court decision, Judge Wilbur W. Warren III, presiding.

2008AP2759-CR State v. Daniel H. Hanson

The principal issue in this case is whether a person can be convicted of attempting to elude an officer while they are speaking with 911 and driving to a police station. More specifically, the Supreme Court is asked to review the application of Wis. Stat. § 346.04(3) to the facts of this case. The case also raises the question whether the real controversy was tried because the trial court excluded certain evidence.

Some background: Some of the facts in this case are disputed. Daniel H. Hanson was pulled over for speeding on I-94 near Kenosha. The officer who stopped the vehicle had a "ride along" passenger in the squad car.

Apparently, after both vehicles came to a complete stop, Hanson exited his vehicle with his driver's license in hand. Deputy Eric Klinkhammer also exited his squad car and approached Hanson telling him to get back into his car. The two had some sort of "exchange." Hanson and the arresting officer each testified that the other person used loud and threatening language and conduct and that he himself behaved in a controlled manner.

Once back in his vehicle, Hanson testified that he was really scared, immediately called 911, requested directions to the nearest police station and proceeded to the station, ignoring the officer's instructions to pull over.

In the 911 tape introduced at trial, "Hanson can be heard informing the 911 dispatcher that he was going to the police station and that he would not pull over because he believed the officer would beat him with a stick [and] he was scared for his life."

Hanson was arrested and eventually charged with two counts of obstructing an officer and one felony count of eluding an officer. Hanson was convicted on both counts, and the Court of Appeals affirmed the convictions.

The first question presented is whether a person can be convicted of attempting to elude an officer while on the phone with 911 and driving to a police station. The Court of Appeals reviewed the plain language of the statute and concluded that the answer is "yes" and published its decision.

The next question was whether there was sufficient evidence at trial to support Hanson's conviction for eluding an officer.

The Court of Appeals ruled that there was sufficient credible evidence that Hanson's actions "interfered with or endangered the operation of other vehicles or pedestrians." Klinkhammer testified that Hanson interfered with vehicles as he cut over to exit at Highway 50, noting that Hanson had to swerve to avoid hitting a squad car parked at the bottom of the off-ramp.

Hanson, however, maintains that none of this captures the real controversy and the case should be retried. Hanson asserts that this case is about a citizen's right to protect himself from a

perceived threat from law enforcement and that the trial court improperly excluded character evidence relating to Klinkhammer's reputation in the community.

The Court of Appeals noted that the jury heard Hanson testify that Klinkhammer raised his voice and was physically aggressive to Hanson.

The jury also heard testimony from four character witnesses that Hanson is a truthful and fair person. Thus, the court was not persuaded that excluding testimony regarding Klinkhammer's alleged reputation for being "hot-headed" prevented the real controversy from being fully tried.

The state objected that the proposed testimony would come "dangerously close" to "other acts" type of situation. Hanson contends that the excluded character evidence "would have been very helpful to the jury as one of the main issues in the case was self-defense."

WISCONSIN SUPREME COURT
TUESDAY, SEPTEMBER 6, 2011
1:30 p.m.

This is an original action, meaning that the case has not been heard in any lower state court. The Supreme Court takes original jurisdiction in a very limited number of cases that generally present issues of pressing, statewide concern.

2010AP1937-OA Wisconsin Prosperity Network, et al. v. Gordon Myse, et al.

In this "original action," a number of organizations and individuals (the petitioners) seek to invalidate all or part of some amendments that the Wisconsin Government Accountability Board (GAB) made to one of its campaign finance regulations, Wis. Admin. Code § GAB 1.28 (GAB 1.28). In particular, the petitioners claim that the amendments, which took effect on Aug. 1, 2010, (1) exceed the authority granted to the GAB by the Legislature and (2) impermissibly chill the speech of Wisconsin citizens, in violation of the First Amendment to the United States Constitution and its counterpart in the Wisconsin Constitution, Wis. Const. Art. I, § 3. (The GAB amendments are not currently being enforced because the state Supreme Court issued a temporary injunction in this case ordering the GAB not to enforce the amendments until the Court said otherwise.)

Some Background: The Legislature has created a system of laws that regulate certain activities connected with campaigns for elective office or with referendum questions. Generally speaking, organizations and individuals are subject to the requirements of those laws if they make contributions, accept contributions, or make disbursements "for a political purpose." Wis. Stat. §§ 11.01(6), (7) & (11). The statutes provide that an act is for a political purpose if it is done for the purpose of "influencing" the nomination of a candidate, the election of a candidate, or the passage or defeat of a referendum. Wis. Stat. § 11.01(16). If one engages in an act that is "for a political purpose," then one may have to meet one or more of a number of requirements, which include: creating a separate account to handle all applicable contributions and disbursements; designating a treasurer who must approve all disbursements; filing a registration statement with the GAB or other applicable government official; paying a $100 filing fee to the GAB; filing an oath, stating that the individual or organization will make disbursements independently of any candidate or candidate's committee; submitting periodic reports to the GAB or other applicable government official; and including disclaimer language in any covered communication that identifies who paid for the communication, and states that the communication was not authorized by any candidate or candidate's agent or committee.

The Legislature has authorized the GAB to issue regulations related to, and to enforce the system of laws regulating elections. One of the regulations promulgated by the GAB has been GAB 1.28, which has provided a further definition of what actions or communications are made "for a political purpose," but which has not imposed any specific requirements on individuals or organizations engaged in activities that are for a political purpose. Prior to the August 2010 Amendments, GAB 1.28 defined actions performed for a political purpose to include only contributions made for a political purpose, contributions made at the request of a candidate or a political committee, and communications that included certain phrases expressly designed to influence an election or equivalent words (e.g., "vote for," vote against," "elect," "defeat," etc.).

The August 2010 amendments to GAB 1.28 included a provision that defined for the first time what constitutes a "communication." The amendments defined "communication" to include not only mass forms of communication, but also all other types of communication that can be used for a political purpose. GAB 1.28 was also changed so that certain disbursements are now included within the definition of actions for a political purpose. The August 2010 amendments also revised the definition of a "political purpose." It now provides, in part, that a communication is "for a political purpose" if it "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," regardless of the specific words used. The second sentence of GAB 1.28(3)(b) further created a presumption that communications made during specified windows of time before a primary or general election that mention a particular candidate and refer to that candidate's personal qualities, character, fitness for office, stance on particular issues, or public record are considered to be communications for a political purpose.

The petitioners allege that the legislature in Wis. Stat. ch. 11 has decided to place requirements only on individuals or organizations that expressly advocate for the election or defeat of a particular candidate or referendum, and not on individuals or organizations that engage in speech that is focused on an issue, even if that speech mentions a candidate's name. Thus, they argue that the August 2010 amendments to GAB 1.28 are invalid because they have gone beyond the scope of the statutes enacted by the legislature. In the alternative, they argue that the free speech right in the First Amendment prohibits states from regulating communications that are focused on a particular issue rather than on the election or defeat of a particular candidate.

The GAB acknowledges that the presumption in the second sentence of the amendments to GAB 1.28(3)(b) does go beyond what the legislature authorized the GAB to regulate. It has attempted to delete that sentence from the rule through an emergency agency rule and a proposed permanent rule. The GAB contends, however, that the rest of the 2010 amendments are within the authority granted by the Legislature to the GAB to regulate elections. It further argues that the other amendments do not impermissibly chill free speech because they merely require a speaker to include certain disclaimer language or to report certain information to a government agency. The GAB points to language in a recent U.S. Supreme Court decision that upholds regulations that impose such disclaimer and reporting requirements.

Because the petitioners are challenging the validity of an agency rule on its face and there are no issues of disputed fact, the Supreme Court can decide the validity without having a trial or hearing in a lower court. It is expected that the Court will decide whether all or part of the August 2010 amendments are valid or invalid and whether they can be enforced by the GAB.

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 7, 2011
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed a Sheboygan County Circuit Court decision, Judge L. Edward Stengel, presiding.

2010AP445-CR State v. Sharon A. Sellhausen

This case examines whether a trial court must on its own initiative, or *sua sponte*, remove a family member from a panel of potential jurors, and whether the defendant is entitled to a new trial even though the family member did not sit on the jury because the defendant exercised a peremptory strike to remove the juror.

Some background: At Sharon Sellhausen's jury trial for battery to a police officer and disorderly conduct, both as a repeat offender, the circuit court judge's daughter-in-law was on the panel of potential jurors.

Defense counsel did not move to strike the judge's daughter-in-law for cause but instead exercised his peremptory challenge. At the post-conviction hearing, trial counsel testified he thought it best not to have a member of the judge's family on the jury but at the time of trial did not know of a specific ground he could have used to move to strike her for cause.

However, he mentioned the judge's questioning of his daughter-in-law and the daughter-in-law's affirmation of her ability to be impartial as the reason he did not believe he could strike her for cause.

At the postconviction hearing, the trial judge stated on the record that before voir dire he had met with both attorneys to let them know that his daughter-in-law would be on the panel. This discussion between the trial judge and the attorneys was off the record. Sellhausen's trial counsel could not recall this conversation well enough to confirm or deny its substance at the post-conviction hearing. The circuit court judge stated, however, that he remembered telling the attorneys he would be happy to excuse his daughter-in-law if either party requested that he do so. The circuit court denied Sellhausen's postconviction motion.

On appeal, Sellhausen claimed she was entitled to a new trial because the presiding judge should have removed his daughter-in-law *sua sponte* instead of forcing her trial attorney to either move to strike for cause or exercise a peremptory strike.

Relying on State v. Tody, 2009 WI 31, 316 Wis. 2d 689, 764 N.W.2d 737, the Court of Appeals ruled that the circuit court erred when it failed to strike the judge's daughter-in-law from the jury panel.

The Court of Appeals reasoned that forcing an attorney to question the judge's daughter-in-law or to use a peremptory challenge raised the risk of creating personal animosity between the party and the judge, potentially affecting the attorney's performance. The Court of Appeals concluded that risk imperiled the overall fairness of the proceedings.

The state argues this court should determine whether a trial judge is required to remove a family member *sua sponte* from the venire panel and, if so, which family members are subject to the rule. Also, it contends the court should decide whether reversal is required when a trial court fails to *sua sponte* remove a family member from the venire panel when the family member did not serve on the jury due to the peremptory strike.

The state notes that it does not dispute it is the better practice to strike a juror *sua sponte*. However, it claims that under State v. Lindell, 2001 WI 108, ¶113, 245 Wis. 2d 689, 629 N.W.2d 223, Sellhausen is not entitled to a new trial because assuming that the circuit court erred, that error was corrected by the peremptory strike.

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 7, 2011
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I, (District IV judges presiding), which reversed a Milwaukee County Circuit Court decision, Judge Martin J. Donald, presiding. The District I Court of Appeals is headquartered in Milwaukee.

2010AP772-CR State v. Carl L. Dowdy

This case examines a circuit court's authority to reduce the length of probation.

Some background: In 2002, Carl L. Dowdy was convicted of second-degree sexual assault with use or threat of force or violence. The circuit court sentenced him to seven years of initial confinement and eight years of extended supervision. The court then stayed this sentence and imposed a 10-year period of probation. One condition of probation was one year of confinement in the Milwaukee House of Corrections. Another condition was sex offender evaluation and treatment.

Seven years later, the defendant petitioned for modification of his period of probation from 10 years to seven years, citing Wis. Stat. § 973.09(3)(a) as authority. Because the defendant had already completed seven years of probation, granting his request would result in his discharge from probation. The defendant asserted a reduction in the probation term was appropriate because his progress on supervision had been largely successful and he would no longer pose a threat to the community.

At an evidentiary hearing on the petition, the defendant presented evidence that he had not contacted the victim in the case while on probation, had completed anger management counseling, maintained employment, and had no addiction or mental health treatment needs.

Three state Department of Corrections (DOC) agents who had supervised the defendant testified about concerns about his history while on probation. The sexual assault victim, through a representative, and the state both objected to the petition.

The circuit court ordered DOC to conduct a new sex offender risk assessment and adjourned the matter pending a return of that report. Following that hearing, the state filed an objection to the petition, arguing that the circuit court lacked authority to modify the length of the defendant's probation.

At a second hearing, the circuit court concluded that it had statutory authority to consider the requested reduction in the probationary period. After hearing additional arguments from the parties, and considering both the new DOC sex offender risk assessment and the report of a private psychological evaluation submitted by defense counsel, the court found good cause to reduce the probation period from the original 10 years to seven years upon payment of court-ordered fees.

The state appealed and the Court of Appeals reversed and remanded. The Court of Appeals said it was clear from the terms of Wis. Stat. § 973.09(3)(a) that the legislature did not intend to grant to circuit courts the authority to "modify" probationary dispositions by reducing them in length.

Dowdy contends that Wis. Stat. § 973.09(3)(a) grants courts broad authority to "modify the terms and conditions" of probation at any time as long as "cause" exists. "Cause," in this

context, has no limitation. State v. Edwards, 2003 WI App 371, ¶ 14, 267 Wis. 2d 491, 671 N.W.2d 371.

The state says while a trial court possesses inherent authority to reduce the length of a probation period on "new factor" grounds, this defendant's alleged compliance with the conditions of probation and alleged rehabilitation progress are not new factors. The state says the trial court did not identify substantial reasons to support reducing the defendant's probation period, and the record reflects substantial reasons not to do so, including the fact that the defendant did not successfully complete sex offender treatment and all three of the defendant's probation agents testified that the defendant consistently violated terms and conditions of his probation.

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 7, 2011
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a Rock County Circuit Court decision, Judge James Welker, presiding.

2009AP608 John Adams v. State

This case involves two petitions for review. A decision by the Supreme Court is expected to establish a precedent as to how the state's livestock facility permitting process interacts with local zoning authority.

Some background: The state's Livestock Facility Siting Law (Siting Law), 2003 Wis. Act 235 [codified in Wis. Stat. § 93.90 and Department of Agriculture, Trade and Consumer Protection Rule (ATCP) 51,] was enacted in 2004. The law created the Livestock Facility Siting Review Board (Review Board) and establishes standards and procedures for local governments if they choose to require conditional-use permits for the siting of new and expanded livestock operations.

One of the petitions for review in this case was filed by the Town of Magnolia (the Town); the other by a group of neighbors (collectively Adams) who live close to the "Confined Animal Feedlot Operation" (CAFO) operated by Larson Acres, Inc. (Larson). Larson's "home" farm had approximately 1,300 cows when this dispute arose. The facility at issue in this case is a satellite heifer facility that houses up to 1,500 "animal units."

On May 2, 2006, Larson applied to the Town for a Conditional Use Permit (CUP) for this satellite heifer facility, which was already in existence. The Town held a contested-case type hearing on the permit application in March 2007. The Town took testimony from a number of experts it had retained to evaluate water quality issues relating to the Larson operation, including concern about elevated nitrate levels in nearby Norwegian Creek and some local wells.

The Town granted the CUP, but attached a number of conditions. The conditions required Larson to follow certain land use and crop rotation strategies in order to reduce and then minimize the buildup of nitrates. The conditions also required Larson to provide updates to the Town regarding its management practices and to allow the Town to conduct monthly water quality tests on drain tile lines.

Larson objected to a number of the conditions and appealed the imposition of those conditions to the Review Board. Larson contended that the Town's conditions exceeded the standards adopted by the Department of Agriculture, Trade and Consumer Protection (DATCP) in Wis. Admin. Code § ATCP 51 under the Siting Law. The Review Board agreed. The Review Board upheld the Town's granting of a CUP to Larson, but eliminated some of the conditions that the Town had attached to the permit.

The Town and Adams sought review of the Review Board's decision in the circuit court. The circuit court concluded that the siting law did not preempt the Town's application of its zoning ordinance on water quality standards. It also ruled that the Board could not direct the Town to reissue the CUP without certain conditions. The circuit court construed the statute as requiring the Review Board either to affirm or reverse the Town's permit in its entirety and remanded to the Review Board with directions to affirm or reverse the permit "in whole."

Larson appealed, and the Court of Appeals reversed. The Court of Appeals addressed, among other things, whether the Siting Law preempts the Town's preexisting authority to impose conditions regarding water quality that differed from those adopted by DATCP under the Siting Law.

The Court of Appeals determined, among other things, that the siting law had expressly preempted the Town's authority under those other sources of authority with respect to livestock operations. It also ruled that the conditions imposed by the Town could not be upheld under a provision that allows political subdivisions to adopt more stringent standards for siting permits because the Town did not adopt specific findings of fact showing that the more stringent requirements were necessary to protect public health and safety. Finally, the Court of Appeals concluded that the Review Board did have authority to remove the challenged conditions rather than to reverse only the entire CUP.

The Town argues that the legislative history of the siting law demonstrates that the law was not intended to eliminate the decision-making authority of local governments over the siting of livestock facilities or to diminish the authority of local governments to protect water quality.

The Town and Adams assert that the Court of Appeals' preemption decision contradicts the state's statutory scheme for protecting water quality. They both emphasize that the protection of water quality is an important public policy that has generally involved all levels of government working together. They argue that the Court of Appeals' decision significantly impairs this partnership that has been developed in state statutes and administrative rules as well as local zoning ordinances over the last 35 years.

Larson contends the Court of Appeals reached its decision by simply applying well-established rules of statutory construction to the plain language of the siting law. It notes that the Court of Appeals applied preexisting preemption rules to the question of whether the siting law preempted local governments from adopting more stringent water quality standards.

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 14, 2011
9:45 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed a Washington County Circuit Court decision, Judge James K. Muehlbauer, presiding.

2009AP2176 Dawn L. Maxwell v. Hartford Union High

This case examines whether an insurance company defending a school district owes the district coverage for damages after the district lost a breach of contract lawsuit filed by a teacher whose job was terminated due to budget concerns.

Some background: In 2007, the district notified Dawn Maxwell, the director of special ed./pupil services it was terminating her contract at the end of the 2006-07 school year. Maxwell, who filed a breach of contract suit, had a contract that included the 2007-08 school year.

At the time, the district had a public entity liability policy issued by Community Insurance Corporation (CIC) and administered by Aegis Corporation. In June of 2008, the circuit court found that the district was liable for breach of Maxwell's employment contract and awarded her compensatory damages in excess of $103,000 in salary and benefits. The circuit court rejected her request for attorney fees in excess of $44,000.

Shortly after the June 2008 determination of liability, the district's director of business services wrote to the Aegis litigation manager demanding a new attorney because the district believed there was a conflict of interest. Although it disputed whether there was actually a conflict of interest, Aegis agreed to appoint the district's current general counsel to replace the first attorney.

On July 24, 2008, general counsel for the district emailed the Aegis litigation manager claiming that CIC was obligated to pay the damages that might be assessed. The Aegis litigation manager responded that the CIC policy issued to the district contained a clause specifically excluding coverage for amounts due under a performance contract and for lost wages and benefits. He said while CIC would not pay for any liability attributed to the district, it would continue to represent the district.

The district sought a declaratory judgment that the CIC policy provided coverage and that CIC was barred from asserting coverage defenses and policy limit defenses. The district argued there is an exception to this rule in situations where the insurer fails to notify the insured of a coverage issue until after the insured suffered prejudice. The circuit court concluded the critical issue presented was whether, regardless of the exclusion of coverage, CIC's conduct created coverage where none would otherwise exist. The circuit court said there was a split of authority as to whether, based on waiver, estoppel, negligence, failure to disclaim, or substantial prejudice, an insurer's conduct can create coverage where none otherwise exists.

The circuit court held that CIC's conduct could not be determined to create coverage. The district appealed, and the Court of Appeals reversed and remanded. The Court of Appeals said in part that the pertinent facts in this case were undisputed and the legal issue presented is whether CIC's exercise of dominion over the underlying lawsuit, without a reservation of rights, operated to provide coverage to the district.

CIC argues that the Court of Appeals confused the duty to defend with the duty to indemnify. It says pursuant to its duty to defend, it furnished counsel to defend the district on the merits of all claims alleged in Maxwell's complaint. CIC also argues the Court of Appeals' decision effectively extinguishes any obligation by insureds to actually read their policies. It says the first sentence of the district's liability policy said, "Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered."

A decision by the Supreme Court could have significant financial implications for insurance companies and consumers statewide.

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 14, 2011
10:45 a.m.

This is a certification from the Wisconsin Court of Appeals, District II (headquartered in Waukesha). The Court of Appeals may certify cases that it believes cannot be resolved by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in Winnebago County Circuit Court, Judge William H. Carver, presiding.

2009AP2907-CR State v. Joseph J. Spaeth

In this certification, the Supreme Court examines whether compelled incriminating statements made to a probation agent as part of a standard requirement of probation may be considered a "legitimate source wholly independent of compelled testimony" under Kastigar v. United States, 406 U.S. 441 (1972). In that case, the U.S. Supreme Court held that the government may compel incriminating testimony so long as it comes with a grant of use and derivative use immunity.

Some background: Defendant Joseph Spaeth, a convicted sex offender, was on extended supervision in 2006 with the standard condition that he must comply with polygraph examinations as requested by his probation agent.

Failure to comply with testing would have been grounds to revoke his extended supervision.

On Feb. 15, 2006, the defendant's probation agent ordered a routine polygraph test. After the test, while the agent and examiner were discussing the results, the defendant disclosed to his agent that he had been "horse playing" with his nieces and nephews, who were children. His statements indicated a clear violation of his rules of extended supervision, so his agent called police to take him into custody on a probation hold. After police were called, the defendant admitted to his agent that he had been tickling his nieces and nephews and may have brushed their genital and chest areas.

Police went to where the defendant had been meeting with his probation agent, handcuffed him, and put him in the back of a squad car. While the defendant was present, his agent told police about statements the defendant had made to her. The defendant was taken to the police station, where he was given his his Miranda warnings.

The defendant told police essentially the same thing he had told his agent. He also said he knew he had a problem and that his actions were wrong. Based on the defendant's written and oral statements to police, a criminal complaint was filed charging him with four counts of sexual assault of a child as a persistent repeater. After a failed motion to suppress, a jury convicted him of all four charges. He was sentenced to life in prison without possibility of parole.

In October of 2008, the circuit court granted a post-conviction motion for a new trial on the ground that extraneous, prejudicial information had affected jury deliberations. (It was discovered that one of the jurors had recognized the defendant's address as the address of a registered sex offender and shared that information with the other members of the jury.) The defendant later pled no contest to an amended information charging him with four counts of child enticement. He was sentenced to five years of initial confinement and ten years of extended supervision and appealed.

On appeal, the defendant argues that his statement to police should have been suppressed under the Fifth Amendment to the U.S. Constitution and Article I, § 8 of the Wisconsin constitution. The defendant argues that his statement was a mere extension of compelled statements he made to his probation agent and thus must be suppressed because it too was compelled.

The District II Court of Appeals says because the defendant's statements before speaking to police were compelled, the statement he made to police is only admissible if there was a sufficient break from the compelled statements and if the statement to police was not "derived from" the compelled statements

The Court of Appeals points out that under Wis. Admin Code § DOC 328.04(2)(w), the defendant's probation agent was required to report all violations of the criminal law by clients to a supervisor or appropriate law enforcement authority. Therefore, the Court of Appeals says once the defendant was compelled to give his incriminating statements to the polygraph examiner and to his probation agent, the agent had a legal obligation to report the statements to police.

The Court of Appeals concludes by saying this area of law is in need of clarification because the fact pattern here will likely recur and because of the tension between Kastigar and the needs and policies of the DOC.

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 14, 2011
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which reversed an Oconto County Circuit Court decision, Judge Michael T. Judge, presiding.

2009AP2422 State v. David W. Domke

In this child sexual assault case, the Supreme Court examines law surrounding a claim of ineffective assistance of counsel.

Some background: A jury convicted David W. Domke of repeatedly sexually assaulting a relative. The defendant filed a postconviction motion alleging that trial counsel Terrence Woods was deficient in a number of respects. Following a hearing, the trial court denied the motion. The defendant appealed, and the Court of Appeals reversed and remanded.

The Court of Appeals noted that in order to establish ineffective assistance of counsel, a defendant must show both deficient performance and prejudice. See Strickland v. Washington, 466 U.S. 668, 687 (1984). It noted in order to establish deficient performance, a defendant must show that counsel's representation fell below an objective standard of reasonableness and must overcome the presumption that counsel's conduct falls within the wide range of reasonable professional assistance. To show prejudice, a defendant must show a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.

The Court of Appeals noted that one of the state's witnesses, social worker Kim Rusch, testified without an objection regarding the victim's depiction of the sexual assaults. The Court of Appeals said Rusch's testimony was inadmissible hearsay. It noted that at the post-conviction hearing, counsel said he believed the testimony of a therapist was admissible over a hearsay objection and he was not aware that the exception for medical diagnosis or treatment in § 908.03(4) does not apply to a social worker.

The Court of Appeals said Rusch's testimony was prejudicial not only in its repetition of the victim's allegations but also due to counsel's improvident questions on cross-examination, which included twice asking Rusch whether the victim might have dreamed that she was sexually assaulted.

The Court of Appeals concluded since a reasonable attorney would have precluded all of Rusch's testimony with a hearsay objection, and if Rusch testified at all, would not have asked questions that invited her to comment on the victim's credibility.

The Court of Appeals went on to conclude that counsel's more serious error consisted of calling the victim's mother as a witness for the defense without first interviewing her. Based on police reports, counsel said he believed the victim's mother would support her husband against her daughter's allegation. However, the Court of Appeals said that before trial, the defendant informed counsel that the mother had been vacillating in that regard. The Court of Appeals concluded that counsel performed deficiently in two respects, the cumulative effect of which undermined confidence in the outcome of the trial.

The state acknowledges that whether an act or omission by defense counsel constitutes deficient performance under Strickland normally does not warrant Supreme Court review because resolution of the issue will depend on the specific facts of the individual case. The state

argues this case is different because it presents the question of whether counsel's ignorance of a relevant case automatically means that counsel's performance was deficient or whether other factors should enter into the determination.

The state argues this court's resolution of that issue will give guidance to lower courts and the defense bar by clarifying the extent to which defense attorneys must acquaint themselves with the finer points of Wisconsin case law or risk having their performance deemed deficient.

The supreme court is expected to decide the following issues:

- Did defense counsel perform deficiently under Strickland, 466 U.S. 668 (1984), because he mistakenly believed that statements the victim made to a therapist during the course of treatment for mental health issues fell within the hearsay exception for statements made for purposes of medical diagnosis or treatment contained in Wis. Stat. § 908.03(4)?
- Did defense counsel perform deficiently when he asked Rusch, the therapist who had treated the victim, whether it was possible that what the victim described as the first of a series of sexual assaults was really a dream?
- Did the Court of Appeals err in finding that Domke suffered prejudice under Strickland from the cumulative effect of counsel's decision to call the victim's mother as a witness and his failure to seek exclusion of Rusch's testimony under State v. Huntington, 216 Wis. 2d 671, 695, 575 N.W.2d 268 (1998)?

WISCONSIN SUPREME COURT
FRIDAY, SEPTEMBER 16, 2011
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a Milwaukee County Circuit Court decision, Judge Richard J. Sankovitz, presiding.

2008AP1830 MBS-Certified Pub. Accountants v. Wis. Bell

This case arises from a class action lawsuit over the practice of "cramming" in which a telephone company deceptively inserts relatively small, unauthorized charges into a telephone bill. As part of its review, the Supreme Court examines the voluntary payment doctrine and statutory damage claims under §§ 100.207, 100.18, and §§ 946.80-946.88 (Wisconsin Organized Crime Control Act or WOCCA).

Some background: The petitioners, MBS-Certified Public Accountants, LLC (MBS) and Thomas H. Schmitt, CPA, d/b/a Metropolitan Business Services claim that several telecommunications companies, including Wisconsin Bell Inc., d/b/a AT & T Wisconsin, ILD Telecommunications, Inc., d/b/a ILD Teleservices, Americatel Corporation and Local Biz USA, Inc., and US Connect, LLC, engaged in cramming.

The petitioners filed a class action complaint on behalf of all Wisconsin consumers who have been wrongfully charged on their telephone bills through cramming. The complaint alleges that this practice has proven to be a highly effective means of stealing money from the customers and that the unauthorized charges were inserted into local telephone bills in a vague and confusing manner. The defendants moved to dismiss the claims on multiple grounds, including the voluntary payment doctrine. The circuit court determined the voluntary payment doctrine barred recovery and granted the motion to dismiss. MBS appealed.

The Court of Appeals affirmed. The Court of Appeals said the voluntary payment doctrine places upon a party who wishes to challenge the validity or legality of a bill for payment the obligation to make the challenge either before voluntarily making the payment or at the time of voluntarily making the payment. See Putnam v. Time Warner Cable of Southeastern Wis., 2002 WI 108, 255 Wis. 2d 447, 649 N.W.2d 626. The Court of Appeals said that the voluntary payment doctrine presupposes wrongful conduct by the payee.

MBS argued the nature of cramming schemes is to insert charges into the customer's bills with the expectation they will not notice the charges or be misled into believing the charges were imposed for requested services. MBS argued that to bar the customers from the remedy precisely because the cramming scheme worked as it was intended would frustrate the legislative purpose.

MBS asks the court to determine whether the voluntary payment doctrine bars damages under Wisconsin Statutes, or the legislature specifically created private rights of action for victims of prohibitive practices. It also inquiries whether individuals must pay illegal fees under protest to preserve their right to bring a statutory claim, even though the statutes in question do not include a protest requirement. Finally, MBS asks whether an exception to the voluntary payment doctrine prevents violators of §§ 100.18, 100.207, and WOCCA from the benefits of that doctrine to escape liability for statutory damages.

Wisconsin Bell contends the Court of Appeals properly applied Putnam. It says that Putnam, following more than a century of well-established law, foreclosed the very argument

made here when Putnam applied the voluntary payment doctrine to a damages claim against Time Warner under Wisconsin's Deceptive Trade Practices Act, § 100.18.

The respondents contend that because the petitioners repeatedly and without protest paid their bills with knowledge of the charges plainly set forth, the voluntary payment doctrine is available to Wisconsin Bell as a defense under §§ 100.207, 100.18 and 946.83. The respondents say that because the telephone bills are clear and unambiguous, the petitioners fail to state a claim against Wisconsin Bell. Further, Wisconsin Bell argues, it did not generate the allegedly unauthorized charges and therefore the complaint fails to state a claim.

A decision by the Supreme Court is expected to clarify the exceptions to the voluntary payment doctrine as set forth in Putnam and Butcher v. Ameritech Corp., 2007 WI App 5, 298 Wis. 2d 468, 727 N.W.2d 546.

WISCONSIN SUPREME COURT
FRIDAY, SEPTEMBER 16, 2011
10:45 a.m.

In this bypass of the District II Court of Appeals (Headquartered in Waukesha), the Supreme Court reviews a decision by Fond du Lac County Circuit Court, Judge Robert J. Wirtz presiding. A party may ask the Supreme Court to take jurisdiction of an appeal or other pending Court of Appeals' proceeding by filing a petition to bypass pursuant to sec. (Rule) 809.60, Stats. A matter appropriate for bypass usually meets one or more of the criteria for review, sec. (Rule) 809.62(1), Stats., and one the Court feels it will ultimately choose to consider regardless of how the Court of Appeals might decide the issues.

2008AP1972 Thomas W. Jandre v. Physicians Ins. Co.

In this medical malpractice case the Supreme Court examines whether Wis. Stat. § 448.30 requires a physician to advise a patient about tests and treatments for possible alternative health problems unrelated to the diagnosed condition.

Some background: On June 13, 2003, Thomas Jandre was at work and driving to a job site when he drank some coffee and it came out his nose. He was also drooling, his speech was slurred, his face drooped on the left side, he was unsteady and dizzy, and his legs felt weak. Co-workers took him to the St. Joseph's Hospital West Bend emergency room (ER).

Jandre was evaluated at the ER by physician Therese Bullis, who read his chart, including the nurse's notes, took a medical, social and family history, and performed a physical examination. Bullis testified that she observed left-side facial weakness and mild slurred speech. She made a list of what she was evaluating the patient for, which included some kind of stroke, Bell's palsy, and various other conditions including tremors and multiple sclerosis.

Bullis' final diagnosis was that Jandre had a mild form of Bell's palsy, an inflammation of the seventh cranial nerve, which is responsible for facial movement. Bell's palsy is not life-threatening, and most people recover after several weeks or months without further symptoms. There is no test for Bell's palsy, and it is diagnosed by ruling out everything else.

Bullis concluded that Jandre was not having a stroke based on the fact that a CT scan did not reveal a hemorrhagic stroke, and her physical exam did not reveal an ischemic stroke. She later testified she did not order a carotid ultrasound to rule out ischemic stroke, and instead listened to Jandre's carotid arteries to determine if she heard a whooshing sound indicative of ischemic stroke.

Three days after the emergency room visit, Jandre went to a physician at a Fond du Lac clinic for a follow-up appointment. The physician's note indicated resolving Bell's palsy. Eleven days later, on June 24, 2003, Jandre suffered a massive stroke. A carotid ultrasound performed at St. Luke's Hospital showed that his right internal carotid artery was 95 percent blocked. Two expert witness physicians who treated him testified at trial that if they had been called on June 13, 2003, they would have ordered a carotid ultrasound and that it would have shown the blockage, which could have been treated by surgery.

In June of 2004, Jandre and his wife filed suit against Bullis, Physicians Insurance Company of Wisconsin (PIC), and the Wisconsin Injured Patients and Families Compensation Fund (the Fund). Jandre alleged that Bullis negligently diagnosed his condition and failed to

disclose information necessary for him to make an informed decision with respect to his treatment.

The Jandres argue Bullis was concerned enough about a stroke to order a CT scan and listen to the carotid artery, and she knew several of the symptoms that Jandre had experienced did not fit the classic presentation of Bell's palsy. They argue given the serious consequences of a stroke, Bullis had a duty to inform Jandre about the potential and alternative method of diagnosis and treatment.

PIC filed a motion for partial summary judgment on the informed consent claim, which was denied, as was a motion for reconsideration.

The case was tried in February of 2008 on both the negligent diagnosis and informed consent claims. The jury found Bullis was not negligent in her diagnosis of Bell's palsy but was negligent with regard to her duty of informed consent. PIC and the Fund filed motions after verdict seeking reversal of the jury verdict based on insufficient evidence or, in the alternative, a new trial because the trial court erred in submitting the question of informed consent to the jury. Those motions were denied.

The jury awarded the Jandres approximately $2 million in damages as well as taxable costs, disbursements, statutory attorney fees and post-verdict interest. The court allocated the damages by ordering PIC, as the primary insurer, to pay $1 million to Thomas Jandre and the Fund to pay the remaining amounts. The court also ordered PIC to pay all taxable costs, disbursements, statutory attorney fees and post-verdict interest on the total amount of the judgment. PIC and the Fund appealed. The Supreme Court denied a petition to bypass. The Court of Appeals affirmed.

The Court of Appeals noted that PIC and the Fund challenged the trial court's construction of § 448.30, which sets forth the duty of informed consent, and PIC alone challenged the trial court's order that it pay all of the judgment interest and costs.

PIC and Bullis argue, among other things, that the Supreme Court should clarify the application of § 448.30. They say the Court should either construe existing case law to limit the duty of informed consent to diagnoses and treatments consistent with the physician's final diagnosis or reconsider prior case law in light of the public policies surrounding malpractice to achieve the same result.

WISCONSIN SUPREME COURT
FRIDAY, SEPTEMBER 16, 2011
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a Milwaukee County Circuit Court decision, Judge William Sosnay, presiding.

2009AP1557 260 N. 12th St. v. DOT

This case involves environmentally contaminated property taken pursuant to eminent domain for a highway construction project in downtown Milwaukee. The Supreme Court examines the admissibility of evidence where market value determinations may be complicated due to the cost of cleaning up the property for the intended use and the possibility of subsequent cost recovery actions against the condemnee.

Some background: The Wisconsin Department of Transportation (DOT) acquired land owned by the petitioners, 260 North 12th Street, LLC and Basil E. Ryan, Jr. (collectively, "Ryan").

Using the statutory condemnation process, Ryan was awarded $1,348,000 (the difference between the jury verdict and the award of damages already paid for the property) on March 30, 2005. Ryan challenged the amount of compensation pursuant to Wis. Stat. § 32.05(11).

The circuit court gave the parties a deadline to submit names of all expert and lay witnesses. Initially, Ryan had retained an expert, Lawrence R. Nicholson, who had prepared an appraisal to value Ryan's property as of Feb. 24, 2005. Ryan's attorney at that time, Alan Marcuvitz, had advised Ryan that while the appraisal report prepared by the DOT had undervalued the property, it had not raised the issue of environmental contamination.

However, after receiving copies of depositions of two DOT representatives, it appeared to Ryan that contamination could be raised as an issue. As the case proceeded, Ryan switched attorneys and added witnesses without approval for a change in the deadline for submitting the names of witnesses.

The DOT moved to strike two of Ryan's witnesses, arguing they had not been disclosed as required by the scheduling order. Further, the DOT noted an August 2007 modification if the order stated that the disclosure deadlines had been met and would not be reset. The circuit court granted the DOT's motion, citing Wis. Stat. §§ 802.10 and 804.12.

The circuit court found there would be a substantial amount of prejudice to the DOT, a minor amount of prejudice to Ryan, and Ryan failed to show good cause for relief from the scheduling order. On Ryan's subsequent motion for partial summary judgment and reconsideration, the trial court held that evidence of environmental contamination and remediation costs was admissible to determine just compensation. It rejected Ryan's argument that a DOT witness's estimates regarding remediation were speculative and lacked foundation.

At trial, the court declined to exclude any portion of the DOT expert's report. It ruled that Ryan's objections went to the weight rather than admissibility of the DOT expert's testimony. The jury determined fair market value of Ryan's property as of March 30, 2005, at $2,001,725. Ryan appealed.

The Court of Appeals affirmed, concluding that Wis. Stat. § 32.09(5)(a) and case law as reflected in Wis. JI-Civil 8100 supported the circuit court's decision to admit the evidence of contamination and remediation.

Ryan argues that where the state reduces the just compensation award by contamination remediation estimates, while leaving open the potential for penalty assessments against the owner for remediation costs under other regulations, a risk of double taking exists, implicating due process violations.

The Court of Appeals said because the trial court applied the proper standard of law, when deciding to admit the evidence, it did not erroneously exercise its discretion. Next, the Court of Appeals concluded the trial court's decision to exclude two additional expert witnesses fell within an appropriate exercise of discretion.

Ryan raises six issues, which may be grouped into three categories. First, whether evidence of environmental contamination and remediation costs is admissible when determining just compensation in an eminent domain case. Second, whether the circuit court erroneously exercised its discretion by excluding the testimony of two of Ryan's expert witnesses due to Ryan's violation of the scheduling order. Third, whether the expert testimony regarding the impaired value of the property was inadmissible because it was speculative and lacked foundation.

The DOT says the Court of Appeals properly concluded that environmental contamination and the need to remediate the contamination are relevant considerations to fair market value. The DOT states that Ryan's arguments relating to the exclusion of two of his experts are not novel, and the Court of Appeals' decision is not in conflict with any Wisconsin statutory law or controlling case law.